



INSTRUCTION STD 6.1

Fed STD 6.1

DATE: July 31, 1979  
SUBJECT: Variance Policy and Procedures

10/30/78

TO: TOSHA Personnel  
Affected Employers (Upon Request)

FROM: Chief, Standards Branch

THRU: Director

Asst. Director

- A. PURPOSE: To set forth policy and procedures concerning applications for variances from occupational safety and health standards and the processing of such applications.
- B. DOCUMENTS AFFECTED: This instruction supersedes TDOL-OSD Program Directive #200-800 dated November 1, 1976.
- C. DOCUMENTS REFERENCED:
- 1 TOSHA-1000, Tennessee Occupational Safety and Health Act of 1972 as amended, § 13, T.C.A. §§ 50-546 - 50-551.
  - 2 TOSHA-1003, Rules of the Tennessee Department of Labor and Tennessee Occupational Safety and Health Review Commission, OCCUPATIONAL SAFETY AND HEALTH, Chapter III - Variances from Occupational Safety and Health Standards (TDL Rules, Chapter 0800-1-2).
  - 3 Tennessee Occupational Safety and Health Plan, Part I, Chapter III - State Plan Assurances and Status, paragraph B.15., page III-12.
- D. BACKGROUND
- 1 After reviewing the Federal variance procedures, the General Accounting Office (GAO) made several recommendations for establishing time frames within which certain actions would occur and for establishing or formalizing certain other variance procedures. Most of these procedures apply to applications for both temporary and permanent variances.
  - 2 OSHA formally adopted these recommended procedures on September 30, 1976 through publication of OSHA Program Directive #76-5 (converted to OSHA Instruction STD 6.1 on October 30, 1978). This instruction also contains other items to be considered by OSHA officials in determining the effectiveness of State variance procedures, but which were not a part of the GAO recommendations. Further, although adoption of the procedures by 18(b) plan states was not made mandatory, such adoption was strongly recommended.
  3. Only two (2) of the five (5) variance applications received in the period from November 1, 1975 to October 31, 1976 were technically correct in accordance with the applicable rules in TDL Rules, Chapter 0800-1-2. The three (3) employers whose applications for a variance were deficient in one or more regards were in contact with personnel of the former Division of Occupational Safety and were given information on applying for a variance. The information provided was good but did not contain sufficient detail. This necessitated two (2) employers having to submit a new application because their original applications were deficient in relatively minor details

although they contained all information sufficient to determine that a grant order could be given. The third employer's application was deficient to the point where extensive additional information had to be submitted before a determination to grant or deny the application could be made. When employers request and are provided information on procedures and then have their applications denied because of technicalities, it places an unnecessary burden on them and may cause them to question the competence of the individual who provided the information or of the division as a whole.

E. POLICY:

1. In accordance with the reference in paragraph C.3., above, "It is the intention of the Commissioner of Labor that all variance applications from occupational safety and health standards will be processed through the Standards Branch of the Division of Occupational Safety and Health." Also, "It is the intention of the Commissioner of Labor to honor all variances granted by the Assistant Secretary for Occupational Safety and Health, U. S. Department of Labor, to multi-state employers having places of employment within the boundaries of the State of Tennessee pursuant to Title 29, Code of Federal Regulations, Sections 1905.13 and 1905.14."
2. The reference in paragraph C.2. above provides specific information on variance applications and their processing in implementing the provisions of law set forth by the reference in paragraph C.1. above. When employers request information on submitting an application for a variance, their attention shall be directed to the contents of TDL Rules 0800-1-2-.05 and 0800-1-2-.06, 0800-1-2-.07, 0800-1-2-.09, and/or 0800-1-2-.18, as may be applicable. Employers shall be provided a copy of TDL Rules, Chapter 0800-1-2, at the time they request information or as soon thereafter as possible.
3. Final decisions on adequate variance applications will normally be made within 120 days of receipt of the application. Time frames for processing applications will normally be as follows:
  - a. Receipt of application to publication of notice in accordance with TDL Rule 0800-1-2-.08(2) - 30 days.
  - b. Public Comment Period - 30 days beginning with day following last date of publication of notice required by TDL Rule 0800-1-2-.08(2).
  - c. Final order signed by Commissioner of Labor and forwarded to the applicant when:
    - (1) No comments or hearing requests received - 45 days following end of comment period.
    - (2) Comments only, received - 60 days following end of comment period.
    - (3) Hearing requested - 60 days, if possible. A longer period of time may be required in order to hold a hearing(s) and make a determination to grant or deny the application based upon information presented at the hearing(s).

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- d. Notice of grant order published in accordance with TDL Rule 0800-1-2-.04 - Copy of legal notice shall be sent to applicable newspapers for publication within five (5) working days following the signing of the grant order by the Commissioner of Labor. See also paragraphs E.3.c. (1), (2), and (3) above.

Applications for variances which do not contain all information required by TDL Rules 0800-1-2-.06(2), and (3) when applicable, and/or 0800-1-2-.18(3), and (4) when applicable, will be denied as procedurally inadequate within 15 working days of receipt by the Chief, Standards Branch. Employers shall be informed of the denial of their variance application by letter which will contain:

- a. The reason(s) for denial.
  - b. When appropriate, a statement that the application may be correctly submitted.
  - c. A requirement that the letter of denial be posted for employees to read.
  - d. A statement that a copy of the letter has been provided to the appropriate compliance activity (safety, health or public sector) and that a limited, general or followup inspection may be expected. Exception see paragraph E.5. below.
5. The Chief, Standards Branch, will request the appropriate compliance activity (safety, health, or public sector) to perform an inspection of the applicant's establishment within 30 days of denial of a variance application where no citation was previously involved. This will not be done when the denial was based on minor defects or deficiencies in the original application and the applicant reapplies for the variance within 30 days.
6. When a variance application based on a citation is denied, the Chief, Standards Branch, will request appropriate compliance activity to schedule a followup inspection for abatement determination in accordance with procedures contained in the Field Operations Manual.
7. The appropriate compliance activity Chief and the appropriate compliance Area Supervisor will be provided a copy of each variance grant order issued to an employer in their area. Following expiration of time to comply with the variance grant order as specified in the order, the Chief, Standards Branch, will request the appropriate compliance activity to schedule and conduct a limited inspection to insure the applicant's compliance with the terms and conditions of the variance grant order.
8. The Standards Branch will make or will request personnel of the Consultative Assistance or Training and Education Branches to make variance inspections when needed to assist in making grant or denied decisions on adequate variance applications. Variance inspections will normally be conducted within 30 days of receipt of the variance application and/or an employee objection to the application. Variance inspections are required under the following circumstances:
- a. The variance application involves flammable and/or combustible liquids,

explosives, electrical equipment, or other hazards as may be determined from time to time.

- b. The variance application is for a temporary or an experimental variance.
- c. An employee or employee representative objects to the granting of a variance application.

Variance inspections are single purpose, non-compliance (not in accordance with T.C.A. §§ 50-520 - 50-525), and will be pre-announced (i.e., the provisions of T.C.A. § 50-525 do not apply). Variance inspections are intended solely to assist in the determination to grant or deny a variance application and will be limited to gathering information concerning the variance application. A representative of the affected employees will be invited to participate in all variance inspections. No citations will be issued as the result of a variance inspection. Should an imminent danger situation be found during a variance inspection, the employer, employees, and the Chief of the appropriate compliance activity and/or the Director will be informed immediately and the employer will be requested to abate any such imminent danger immediately.

- 9. Variance application files will be maintained in the Standards Branch and will contain information on which the decision on which to grant or deny the application was based, the application, the grant order or letter of denial, and public notices of the application and grant order or denial. Specific information to be included is as follows:
  - a. Applications - as required by applicable TDL Rules in Chapter 0800-1-2.
  - b. Supplementary information - summary or results of variance inspection, if conducted; reasons why variance inspection deemed not to be necessary; copies of all supplementary correspondence with the applicant or other interested parties; copies of objections to the grant of a variance, if any; request(s) for a hearing; and summary or transcript of the hearing(s), if held.
  - c. Grant order -
    - (1) Heading to include name and address of applicant(s), variance case number ("V", a space followed by last two (2) digits of calendar year, a dash, and consecutive number starting with "1" for each calendar year; e.g., "V 79-2"), and identification of the standard(s) from which the variance is sought; e.g., "29 CFR 1926.451(a)(4), (5) & (10).
    - (2) Background to include date of application, name and address of applicant, mailing address of applicant, identification of standard(s) from which the variance is sought, summary of standard(s) subject, summary of basis for the application (law and TDL Rules), statement of examination and adequacy of application as basis for action, summary of public notices on application, summary of requests for hearing (if any) or statement no hearing requested, statement that application certifies employer has notified affected employees of application and their right to request a hearing, and statement on whether or not written comments were submit-

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ted concerning the application.

- (3) Facts to include summary of application and results to OSHA (if applicable), summary of applicant's business operations with regard to the variance, and summary of how the applicant proposes to provide protection as effective as the standard(s) from which the variance is sought. The latter two (2) items may be omitted if the same as in an OSHA grant order or interim grant order and reference to the Federal Register (date, volume, and page number(s)) in which such order was published substituted in lieu thereof. Also, a summary of any facts relative to the variance submitted through written comment or presented at a hearing(s) shall be included when applicable.
  - (4) Decision to include a summary of the standard's requirements and purpose and why the applicant's proposal was determined to provide protection as effective as that required by the standard(s) from which the variance is sought.
  - (5) Order to include legal authority for granting the order, name and address of applicant, ~~summary of authorization to use alternatives to standard(s), and conditions for such authorization.~~ The last two (2) conditions listed in every order shall be:
    - (a) That the employer to whom the order is issued notify the affected employees of the terms and conditions of the order, and
    - (b) That the employer post a copy of the variance grant order at or near each place affected by the order or, where such is not practical, in a prominent place where it will be readily observable by all affected employees.
  - (6) Effective date to include the date on which the order is effective and period of time it remains in effect or until modified or revoked and date and place of issuance.
  - (7) Signature - variance grant orders shall be signed only by the Commissioner of Labor.
- d. Letter of denial - see paragraph E.4.
- e. Public Notices -
- (1) Notice of Application Receipt:
    - (a) Name and address of TOSHA.
    - (b) Name and address of applicant.
    - (c) Identification of standard(s) and brief statement of to what the standard(s) pertain.
    - (d) Statement application comports with applicable law and rules (cite T.C.A. section and rule).
    - (e) Statement of time(s) and place(s) of hearing(s) if requested
    - (f) Statement of opportunity to submit comments or request a hearing and date by which such must be submitted.

(2) Notice of Variance Grant:

- (a) Same information required by subparagraphs E.9.e.(1)(a)-(c) except in the order of (a), (c), (b).
- (b) Effective date of grant order.
- (c) Brief summary of grant order applicability (description of worksite).
- (d) Statement that granting of variance comports with applicable law and rules (cite T.C.A. section and rule).

Temporary variances are technically available only during that period of time between promulgation of a standard and its effective date for employers unable to come into compliance within that time. Applications for temporary variances to achieve the same purpose as a PMA (see paragraph E.11 below) will be denied.

11. When employers seek a variance as a means of abatement while under citation, they will be requested to submit a petition for modification of abatement date (PMA) in accordance with the TOSHA Field Operations Manual, Chapter X, paragraph B.8. Such PMAs should request that the abatement date be modified to the date on which a variance grant order is effective or a date following the date of denial of a variance plus the original abatement period. Employers should not seek a PMA grant to extend the time period by which they must come into compliance with a newly promulgated standard, i.e., to extend the standard's effective date, as they can not be cited for violation of a standard until its effective date and PMAs are used only to modify abatement dates for correction/abatement of cited violations.

Receipt of variance applications shall be acknowledged within five (5) working days by letter to the applicant. In the receipt acknowledgement letter, the applicant shall be requested to certify that a variance application concerning the same standard(s) has not previously been acted upon by the U. S. Department of Labor - OSHA. This certification is to avoid inadvertent granting of a variance which has been denied by OSHA and/or the possibility of unnecessary concurrent Federal/State action on a variance request. In the receipt acknowledgement letter, the applicant shall be requested to provide a copy of any application for a variance to OSHA, if such has been submitted, plus a copy of all correspondence with OSHA concerning such application, in lieu of the certification that no such application has been acted upon by OSHA.

F PROCEDURES:

1. All variance applications shall be stamped with the date of receipt by the Area Office or Central Office which receives them and shall be forwarded to the Chief, Standards Branch, as soon as possible (Area Offices shall forward variance applications by separate mail if necessary).
2. All TOSHA-207 Compliance Progress Letters shall be carefully screened to

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insure an application for a variance is not included. (There have been instances where TOSHA-207s contained variance applications but were filed in compliance case files resulting in delays in processing in excess of 90 days.) When a variance application, or any resemblance thereof, is contained in a TOSHA-207, the Area Office shall forward the original as set forth in paragraph F.1. above and make a copy for file purposes.

3. The Chief, Standards Branch, shall process all variance applications in accordance with referenced documents (see paragraph C.) and the policies set forth in this instruction (see paragraph E.).

G. ACTION:

All professional personnel shall become familiar with TDL Rules, Chapter 0800-1-2, Variances from Occupational Safety and Health Standards, and in particular with Rules 0800-1-2-.06 and 0800-1-2-.18.

2. If questions arise during discussions or conferences with employers which can not be answered from information contained in this instruction or the documents referenced in paragraph C., above, they shall be referred to the Chief, Standards Branch..

- H. EFFECTIVE DATE: This instruction is effective on July 31, 1979 and shall remain in effect until cancelled or superseded.